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## COMMENT

### ANTITRUST AND THE CONSUMER INTEREST: CAN SECTION 4 OF THE CLAYTON ACT SURVIVE THE CURRENT SUPREME COURT?

#### INTRODUCTION

The antitrust laws are designed and, to some extent, function to protect free enterprise and the benefits deemed to attend that system of allocating resources available to the nation's economy. According to the proponents of antitrust regulation, the chief evils from which free enterprise requires protection are the anti-competitive efforts of actual and potential monopolists to strangle the free enterprise mechanism and to prevent or inhibit realization of its goals.<sup>1</sup> While the primary responsibility for enforcement of the federal antitrust laws rests with government agencies, the availability of remedies to private parties injured by their violation has traditionally been recognized as a necessary supplement to government enforcement.<sup>2</sup> Additionally, Congress has demonstrated its belief that consumers have important rights in the antitrust context by enacting legislation authorizing state attorneys general to seek treble damages under a *parens patriae* theory for injuries suffered by citizens of their states.<sup>3</sup> As a supplement to the enforcement efforts of the several government agencies with jurisdiction over antitrust matters, the private treble damage action helps to prevent the adulteration and eventual disintegration of our free enterprise system.

This comment will survey the main tools available to the consumer and his representative and assess their effectiveness in attaining the dual goals of compensation and deterrence. Specifically, it will examine the remedies provided by section 4 of the Clayton Act<sup>4</sup> and their application through the Rule 23<sup>5</sup> class action and *parens patriae* devices. Finally, the

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1. See A. AUSTIN, ANTITRUST: LAW, ECONOMICS, POLICY §§ 2.1, 12.8 (1976).

2. See, e.g., *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318-26 (1965).

3. Antitrust Improvements Act of 1976, tit. III, 15 U.S.C. §§ 15(c)-(h) (amending Clayton Antitrust Act § 4, 15 U.S.C. § 15 (1970)).

4. 15 U.S.C. § 15 (1970).

5. FED. R. CIV. P. 23.

potential of the Supreme Court's recent decision in *Illinois Brick Co. v. Illinois*<sup>6</sup> for leaving many consumers with no remedy at all will be scrutinized.

### I. THE ORIGINS OF THE FEDERAL ANTITRUST LAWS

Until the Civil War, the industrial growth of the United States had been relatively slow. Particularly in the South, agriculture dominated export trade. In part, the conflict between the increasingly industrialized northern states and the agricultural South provided the economic, if not moral, basis for the war.<sup>7</sup> Having won the war, northern industry undertook the task of winning the West.

Western migration and development of the railroads leapfrogged at an astounding pace.<sup>8</sup> As the settlements west of the Mississippi River were established, they became markets for the industries of the Northeast. The railroads served as vast conveyor belts, transporting equipment and other manufactured goods westward and agricultural produce eastward. Huge fortunes were amassed by businessmen, and by the builders and operators of the railroads. Federal land grants, designed to encourage and facilitate the westward migration, supplied railroads and settlers with millions of acres of land.<sup>9</sup> By the last decade of the nineteenth century the United States had become the world's foremost industrial nation, and the frontier within the continental United States had disappeared.<sup>10</sup>

America's success was reflected in the empires of the Goulds, Rockefellers, Carnegies, and Morgans. For most of the United States, however, the meteoric rise of their nation was more apt to spell depression, ruin, and poverty. As Professor Limbaugh wrote in his study of the origins of antitrust legislation, "Farmers, traders, laborers, individual business proprietors and small business enterprises were frequently rendered helpless and often disappeared in the fierce wars of the leviathans of the new order for the control of the railroads, industries and finance of the country."<sup>11</sup> Men of great vision and ability were overcome by the

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6. 431 U.S. 720 (1977).

7. See C. BEARD, *THE RISE OF AMERICAN CIVILIZATION* 635-40, 663-724 (1930).

8. "With a stride that astounded statisticians the conquering hosts of business enterprise swept over the continent; twenty-five years after the death of Lincoln, America had become, in the quantity and value of her products, the first manufacturing nation of the world." *Id.* at 193.

9. H. THORELLI, *THE FEDERAL ANTITRUST POLICY* 85-86 (1954).

10. See Limbaugh, *Historic Origins of Antitrust Legislation*, 18 MO. L. REV. 215, 230-33 (1953).

11. *Id.* at 237.

prospect of piling fortune upon fortune until only self-interest kept avarice in check. When they had fought to a standstill, these aggrandizers sought methods of maximizing their profits by minimizing competition.

First came the pool, a loosely knit organization of independent entrepreneurs bound by a gentlemen's agreement not to compete too stridently with one another. Its purpose was to ensure price stability in the relevant commodity despite market pressure to the contrary. Pools enjoyed limited success, however. The character of the men involved and the temptation to undercut competitors made the pools vulnerable. Since there was no binding legal force, such informal agreements tended to collapse too easily in the spirited atmosphere of competition. The holding company was another device designed to facilitate the inhibition of competition within an industry. By this device a corporation was formed to own and deal in stock of other corporations for the purpose, among others, of restricting competition among them. In 1889 the state of New Jersey experienced a windfall of revenue when it passed legislation permitting the establishment of holding companies.<sup>12</sup>

It was the trust, however, which was unequaled in its cunning and potential for monopolization.<sup>13</sup> Its invention, or more precisely, its application as a method of aggrandizing economic power on an industrial scale, is attributed to the legal genius of a small group of lawyers employed by the Standard Oil Company.<sup>14</sup> In simple terms, a trust is an arrangement whereby the owners of stock in several competing companies combine their holdings in a trust account. The trustees are instructed to operate the several companies to maximize the profits of the owners as a group. Insofar as the group obtains power approaching a monopoly over the industry concerned, the policy which would best ensure maximum profitability would plainly be the policy which limits competition as much as possible.<sup>15</sup> In fact, the power wielded by businesses being operated by trusts around the turn of the century was astounding. In 1900, the first business census revealed that trusts controlled businesses valued at nine billion dollars.<sup>16</sup>

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12. *Id.* at 232-34. The Sherman Act was held applicable to holding companies in *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904).

13. J. VON KALINOWSKI, *ANTITRUST AND TRADE REGULATION* § 2.02(2)(b) (3d ed. 1976). See also Jones, *Historical Development of the Law of Business Competition*, 36 *YALE L.J.* 207, 217 (1926).

14. W. GELLHORN, *ANTITRUST LAW AND ECONOMICS IN A NUTSHELL* 17 n.2 (1976). See also Limbaugh, *supra* note 10, at 234-35 nn.97 & 98 (1953).

15. See, e.g., 21 *CONG. REC.* 137 (1889) (remarks of Senator Turpie).

16. Limbaugh, *supra* note 10, at 236. The industries controlled by trusts were numerous, including oil, steel, whiskey, salt, sugar, cordage, lead, cottonoil, steel rail, nail,

To the American people of the 1870's and 1880's, the trust played the part of villain, responsible for the economic difficulties which plagued them.<sup>17</sup> Their impressions were not unfounded. The investigations of muckrakers and congressional committees pointed out the abuses of the giant industrial organs.<sup>18</sup> The American public

came to realize that the economic laws of supply and demand, competition in business and freedom in trade, on which the economic foundations of the nation were laid, were no longer effective; that the ideals of equality of opportunity, individual freedom, self-reliance and personal initiative, which had sustained the character of the nation, were losing their pre-eminence.<sup>19</sup>

In 1887 the Interstate Commerce Act<sup>20</sup> was enacted to curb abuses by the railroads,<sup>21</sup> targets for some of the earliest and most vehement criticism.<sup>22</sup> It was apparent, however, that the abuses of the trusts went

iron, nut and washer, barb fence-wire, copper, slate-pencil, nickel, zinc, oilcloth, jute-bag, paper envelope, gutta-percha, castor oil, borax, ultramarine. VON KALINOWSKI, *supra* note 13, at § 2.02(2) n.75.

17. VON KALINOWSKI, *supra* note 13, at § 2.02(3).

The public placed much of the blame for the several depressions and the resulting unemployment, business failures, poverty, and other economic evils upon big business, particularly the pools, trusts, and other vast industrial combinations that controlled much of the nation's economy. By the late 1880's, there was a widespread public demand for the enactment of a federal statute which would destroy the power of the trust or, at the least, eliminate their abusive and monopolistic practices.

*Id.* See GELLHORN, *supra* note 14, at 18-19, in which the author suggests that tight money and protectionist tariffs added to the public's unrest.

18. See generally Limbaugh, *supra* note 10, at 236-42, 246-47. To obtain the advantages associated with monopoly power "competitors were ruthlessly eliminated, and the victor in the conquest was able, at the expense of the public and through the cooperation of other victors in similar conquests, to fix prices, control markets, and realize profits unhindered and unrestrained" by the troublesome forces of a free market. *Id.* at 239. See also REPORT ON INVESTIGATION OF TRUSTS, H.R. REP. NO. 9, 50th Cong., 1st Sess. (1888).

19. Limbaugh, *supra* note 10, at 237. See also AUSTIN, *supra* note 1, at § 3.1.

20. Ch. 104, 24 Stat. 379 (1887) (current version at 49 U.S.C. §§ 1-15 (1970)).

21. Limbaugh, *supra* note 10, at 247. The Interstate Commerce Act provided comprehensive regulation of practices in the transportation industry, particularly railroads. Practices regulated included prices, supply of cars, material to be transported, and allocation of services among customers. The principal complaints about the railroads concerned arrangements with the trusts involving rebates and preferential prices. Such an arrangement between the Standard Oil trust and the railroads was widely reported. *Id.*

22. Best, *The Antitrust Controversy—A Survey*, 17 BUS. LAW. 859, 860 (1962). Popular agitation, especially by groups representing farmers, such as the Grangers, had achieved the passage of state regulations governing railroads, but the enormity and interstate character of the business made such regulations relatively ineffective. In *Munn v. Illinois*, 94 U.S. 113 (1876), the Supreme Court held that states could regulate railroads despite their interstate character. In *Wabash, St. L. & Pac. Ry. v. Illinois*, 118 U.S. 557 (1886), the

far beyond those of the railroads.<sup>23</sup> The anger and frustration of the American people were translated into law with the passage of the Sherman Antitrust Act in 1890.<sup>24</sup>

The Sherman Act, described as similar to a constitutional amendment in its scope,<sup>25</sup> proscribed conspiracies or combinations which unreasonably restrain trade.<sup>26</sup> Congress, whether through inadvertence or, as suggested in *Apex Hosiery Co. v. Leader*,<sup>27</sup> by design, left to the courts the task of giving specific meaning to the generalities of the Act.<sup>28</sup> During the early years of the twentieth century, the judiciary was rather sympathetic to laissez-faire economic theories.<sup>29</sup> This sympathy resulted in a general coolness on the part of the courts toward the antitrust laws and their enforcement.<sup>30</sup> In short, the Sherman Act was not a tremendous

Court severely limited the *Munn* decision by holding that a state may only regulate transportation within the state, not transportation through the state.

23. Jones, *supra* note 13, at 207, 217.

24. Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209 (codified at 15 U.S.C. §§ 1-7 (1970)). See Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221 (1956); Jones, *supra* note 13, at 207, 213-19; Limbaugh, *supra* note 10, at 243-48.

25. The Act, as a "charter of freedom . . . has a generality and adaptability comparable to that found to be desirable in constitutional provisions." *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933).

26. 15 U.S.C. § 1 (1970). The language of the Sherman Act § 1 literally prohibits all combinations in restraint of trade. In *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *modified & aff'd*, 175 U.S. 211 (1899), the Court suggested the so-called "rule of reason" doctrine, under which the Sherman Act was construed to prohibit only those restraints which *unreasonably* restrained trade. The rule was explicitly stated and firmly established in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). For a thorough discussion of the "rule of reason" in the development of the antitrust law, see M. HANDLER, *ANTITRUST IN PERSPECTIVE* (1957).

27. 310 U.S. 469, 489 (1940).

28. The Court wrote:

The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act itself does not define them. In consequence of the vagueness of its language, perhaps not uncalculated, the courts have been left to give content to the statute, and in the performance of that function, it is appropriate that courts should interpret its words in light of its legislative history and of the particular evils at which the legislation was aimed.

*Id.* In grappling with the slippery concepts of the Act the Court developed, along with the "rule of reason," the doctrine that certain offenses constitute "per se" offenses, regardless of their reasonableness or the benevolence of the actors. *E.g.*, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (combination to fix prices is illegal per se). This concept has, however, not been applied consistently, or in every situation. *E.g.*, *United States v. Citizens & Southern Nat'l Bank*, 422 U.S. 86 (1975) (combination to fix banking service prices held not per se violation).

29. THORELLI, *supra* note 9, at 254. "The courts of the nation, now more than ever intrigued by the philosophy of laissez-faire . . .," had little sympathy for the goals of the Sherman Act. "The foremost examples of legislation thus suffering at the hands of the courts were the Sherman Antitrust Act and the Interstate Commerce Act." *Id.* See generally GELLHORN, *supra* note 14, at 24-28.

30. See, *e.g.*, *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (refusal to apply

success during its early years, primarily because of judicial conservatism and half-hearted enforcement efforts by the Justice Department.<sup>31</sup>

It was the courts, nevertheless, which were responsible for the eventual renaissance of antitrust legislation. Despite cases such as *Northern Securities Co. v. United States*,<sup>32</sup> the enforcement of the antitrust statute in the first decade of this century was not as enthusiastic as the people of the nation wished it to be. When the Supreme Court announced that it was adopting a "rule of reason" in order to avoid a construction of the Sherman Act which would have rendered its enforcement impossible, the public outcry again prodded Congress into action.<sup>33</sup> Two pieces of legislation emerged. One, the Clayton Act,<sup>34</sup> amended the Sherman Act to make its prohibitions applicable to specific practices and to activities with undesirable tendencies as well as completed actions. The other established the Federal Trade Commission to regulate business practices in general.<sup>35</sup> It is section 4 of this Clayton Act<sup>36</sup> which provides the consumer with potential weapons against the less conscionable practices of the businessman.

## II. REQUIREMENTS OF THE SECTION 4 ACTION

The Sherman Act as originally passed<sup>37</sup> and the Clayton Act<sup>38</sup> both provide for the award of treble damages plus costs and reasonable

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Sherman Act to manufacturing as opposed to commerce). *See also* *United States v. Nelson*, 52 F. 646 (D. Minn. 1892); *In re Greene*, 52 F. 104 (S.D. Ohio 1892); *In re Corning*, 51 F. 205 (N.D. Ohio 1892).

31. *See* VON KALINOWSKI, *supra* note 13, at § 10.02(2). "There was general agreement that the Sherman Act was not doing the job, that it was vague, and that specific business practices had to be prohibited by law." *Id.* at § 10.02(1). *See generally* Montague, *The Defects of the Sherman Antitrust Law*, 19 YALE L.J. 88 (1909).

32. 193 U.S. 197 (1904). In *Northern Securities*, The Sherman Act was given a literal interpretation condemning all combinations in restraint of trade. This interpretation was recognized to be untenable in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

33. *See generally* VON KALINOWSKI, *supra* note 13, at § 10.02(2); AUSTIN, *supra* note 1, at § 3.4. *See also* GELLHORN, *supra* note 14, at 26-27 n.6, citing a study which showed that during the first 12 years after passage of the Sherman Act only 23 government prosecutions occurred. Of those, seventeen "were brought by United States attorneys in the field, not by the Justice Department; and of the six brought by the Justice Department, four were directed against labor unions and the other two (directed against the beef trust and a massive railroad merger) came at the end of the period." *Id.* Professor Gellhorn disputes the contention, however, that the public was aroused by "quixotic judicial approaches and executive indifference," but instead attributes the public outcry which was responsible for passage of the Clayton and Federal Trade Commission Acts to President Roosevelt's trustbusting rhetoric and his ability to infect the public with enthusiasm for any cause. *Id.* at 26-27.

34. 15 U.S.C. §§ 12-27 (1970).

35. 15 U.S.C. §§ 41-58 (1970).

36. 15 U.S.C. § 15 (1970).

37. Ch. 647, §§ 1-7, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1970)).

38. Ch. 323, § 4, 38 Stat. 731 (1914) (current version at 15 U.S.C. § 15 (1970)).

attorney's fees to a successful plaintiff in an action based on injury sustained because of a violation of the antitrust laws. In addition, section 16 of the Clayton Act makes injunctive relief available to the private plaintiff for "threatened loss or damage by a violation of the antitrust laws."<sup>39</sup> This article will consider both the essential requirements of an action brought under section 4 of the Clayton Act,<sup>40</sup> and the effectiveness of trebling damages in deterring potential violators or in compensating the victims of anticompetitive behavior.

Section 4 authorizes the award of treble damages to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."<sup>41</sup> The courts have construed section 4 to require that a plaintiff be a person, as defined in section 1 of the Clayton Act,<sup>42</sup> that a violation of the antitrust laws, as defined in section 1, has occurred,<sup>43</sup> that the plaintiff has suffered an injury to his business or property,<sup>44</sup> that the causal connection between the antitrust violation and the injury to plaintiff's business or property be sufficiently proximate,<sup>45</sup> and that plaintiff's injury be reducible to a reasonably approximate dollar amount.<sup>46</sup>

The term "person" is defined in section 1 to include corporations and associations,<sup>47</sup> and has been judicially interpreted to include individuals<sup>48</sup> and partnerships.<sup>49</sup> Furthermore, states,<sup>50</sup> cities,<sup>51</sup> and foreign sover-

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39. 15 U.S.C. § 26 (1970).

40. 15 U.S.C. § 15 (1970).

41. *Id.*

42. *Id.*

43. *Id.*

44. *E.g.*, *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972) (the Court construed "business or property" to mean "commercial interests").

45. The two main tests used are the "direct injury" test, which requires a relationship similar to privity, and the "target area" test, which requires the plaintiff to have been the target of the alleged violation, or alternatively, within the area of the economy likely to be harmed by it. *See* notes 78-87 & accompanying text *infra*.

46. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562-63 (1931) (permitting estimation of amount of damages by "just and reasonable inference, although the result be only approximate").

47. 15 U.S.C. § 12 (1970).

48. *E.g.*, *Hoffman Motors Corp. v. Alfa Romeo S.p.A.*, 244 F. Supp. 70, 82 (S.D.N.Y. 1965) (corporate employee could be sued in his individual capacity for acts committed as an agent of the corporation). *See also* *Allen Organ Co. v. North Am. Rockwell Corp.*, 363 F. Supp. 1117, 1129-30 (E.D. Pa. 1973).

49. *E.g.*, *Western Laundry & Linen Rental Co. v. United States*, 424 F.2d 441, 443 (9th Cir.), *cert. denied*, 400 U.S. 849 (1970).

50. *E.g.*, *Georgia v. Evans*, 316 U.S. 159 (1942).

51. *E.g.*, *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390 (1906).



eigns<sup>52</sup> have been held to be persons for purposes of the Clayton Act. The federal government has been held not to be a person because its enforcement role makes the treble damage inducement unnecessary.<sup>53</sup> However, an amendment to the Clayton Act enables the federal government to sue for a single measure of damages and costs.<sup>54</sup>

The antitrust laws, as the term is used in section 4 and defined in section 1, comprehends only four statutes: the Sherman Act itself,<sup>55</sup> the Clayton Act,<sup>56</sup> the Wilson Tariff Act,<sup>57</sup> and the act amending the Wilson Tariff Act.<sup>58</sup> Because the statutory definition is quite explicit, and despite the existence of other statutes commonly referred to as antitrust laws which are not included, the Supreme Court has held the doctrine *expressio unius est exclusio alterius* applicable.<sup>59</sup> Consequently, the Court held that only those statutes specifically included in section 1 will, if violated, support a section 4 action.<sup>60</sup> Notably excluded from treble damage claims by the Court's construction are violations of the Federal Trade Commission Act<sup>61</sup> and parts of the Robinson-Patman Act.<sup>62</sup>

The private plaintiff is thus entitled to bring an action for injury sustained as a result of: (1) a contract or combination in the form of a trust or otherwise,<sup>63</sup> or conspiracy in restraint of interstate or foreign trade or commerce;<sup>64</sup> (2) attempts or conspiracies to monopolize inter-

52. *E.g.*, *In re Antibiotics Antitrust Actions*, 333 F. Supp. 315 (S.D.N.Y. 1972) (government of Kuwait held to be a person). *See also* Velvel, *Carving Holes in the Sherman Act: A Comment on the Citizens & Southern Case*, 25 CATH. U.L. REV. 535 (1976).

53. *E.g.*, *Parker v. Brown*, 317 U.S. 341 (1943).

54. 15 U.S.C. § 15(a) (1970).

55. 15 U.S.C. §§ 1-7 (1970).

56. 15 U.S.C. §§ 12-27 (1970).

57. 15 U.S.C. §§ 8-11 (1970) (proscribing activities which restrain trade in imported goods).

58. Ch. 40, 37 Stat. 667 (1913) (current version at 15 U.S.C. § 11 (1970)).

59. Expression of one thing is the exclusion of another. BLACK'S LAW DICTIONARY 693 (4th ed. 1951).

60. *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 376 (1968).

61. 15 U.S.C. § 45 (1970), proscribing "unfair methods of competition . . . and unfair or deceptive practices" in or affecting commerce. *See, e.g.*, *Carlson v. Coca-Cola Co.*, 318 F. Supp. 785 (N.D. Cal. 1970), *aff'd*, 483 F.2d 279 (9th Cir. 1973).

62. Section 3 of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1970), along with § 2 of the Clayton Act, as amended by § 1 of the Robinson-Patman Act, 15 U.S.C. § 13 (1970), prohibits selling "at unreasonably low prices for the purpose of destroying a competitor." Because § 3 has been held to be a separate and independent statute, rather than an amendment of the Clayton Act, no private treble damage action will lie for violation of its provisions, except insofar as the same activity is proscribed independently by the Clayton Act. *See generally* VON KALINOWSKI, *supra* note 13, at § 11.01(1).

63. The form of agreement has been interpreted to require two elements; that more than one person be involved, and that there be a common design or purpose. *See, e.g.*, *Poller v. CBS*, 368 U.S. 464 (1962); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1950).

64. 15 U.S.C. § 1 (1970).

state foreign trade;<sup>65</sup> (3) discrimination in prices, services, or facilities which may have the effect of substantially lessening competition or creating monopoly conditions;<sup>66</sup> (4) tying agreements, exclusive dealing agreements, and requirement contracts;<sup>67</sup> (5) illegal corporate mergers or acquisitions;<sup>68</sup> or (6) the existence of interlocking directorates in certain situations.<sup>69</sup> The burden is upon the plaintiff to prove that a violation of the antitrust laws has occurred.<sup>70</sup> This considerable task is often lifted from the shoulders of the private plaintiff, however, by section 5 of the Clayton Act<sup>71</sup> which provides that a final judgment or decree in a government antitrust action determining that the defendant has violated the antitrust laws is prima facie evidence against that defendant in a subsequent private action arising out of the same violation.<sup>72</sup> The prima facie effect is limited, however, by the exclusion of consent judgments or decrees entered prior to the taking of any testimony and by the exclusion of judgments or decrees in actions by the federal government under

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65. 15 U.S.C. § 2 (1970).

66. 15 U.S.C. § 13 (1970).

67. Tying agreements require a customer to purchase product X in order to be allowed to purchase product Y. Exclusive dealing arrangements require a buyer to sell only products of company X; if the buyer also sells products of company Y, company X will refuse to deal with him. Requirement contracts require a buyer to purchase all his requirements from the same seller. The anticompetitive effect of each is readily apparent.

68. Two examples are those which may substantially lessen competition or which tend to create monopoly conditions. Because § 7 of the Clayton Act, 15 U.S.C. § 18 (1970), is prospective in forbidding the future acquisitions of companies, some courts have held that a plaintiff cannot be damaged by an action which has not yet occurred and that consequently a § 7 violation will not ground a § 4 action. *E.g.*, *Gottesman v. General Motors Corp.*, 221 F. Supp. 488, 493 (S.D.N.Y. 1963), *rev'd*, 414 F.2d 956 (2d Cir. 1965), *cert. denied*, 403 U.S. 811 (1970). The reversal, the following cases, and commentators indicate, however, that this argument has not been favored. *See, e.g.*, *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965) (by implication); Stein, *Section 7 of the Clayton Act As a Basis for the Treble Damage Action: When May the Private Litigant Bring His Suit?*, 56 CALIF. L. REV., 968 (1968); Note, *Private Actions Under Sections 4 and 7 of the Clayton Act: A Fresh Look At an Old Problem*, 29 OHIO ST. L.J. 756 (1968). *Cf.* *GAF Corp. v. Circle Floor*, 329 F. Supp. 823, 829 (S.D.N.Y. 1971), *aff'd*, 463 F.2d 752 (2d Cir.), *cert. denied*, 413 U.S. 901 (1972) (damages held too remote to permit recovery in uncompleted merger).

69. 15 U.S.C. §§ 19-20 (1970) (interlocking directorates and officers in banks and common carriers dealing with suppliers who have officers in common with the carrier).

70. *E.g.*, *Simpson v. Union Oil Co.*, 311 F.2d 764, 767 (9th Cir. 1963), *rev'd on other grounds*, 377 U.S. 13 (1964); *Glenn Coal Co. v. Dickinson Fuel Co.*, 72 F.2d 885 (4th Cir. 1934). *See generally* Lanzillotti, *Problems of Proof of Damages in Antitrust Suits*, 16 ANTITRUST BULL. 329 (1971); Comment, *Proof Requirements in Antitrust Suits: The Obstacles to Treble-Damage Recovery*, 18 CHI. L. REV. 130 (1950).

71. 15 U.S.C. § 16 (1970), *as amended by* Antitrust Procedures and Penalties Act of 1974, Pub. L. No. 93-528, 88 Stat. 1706.

72. *Id.* at § 16(a).

section 4a of the Clayton Act.<sup>73</sup> The purpose of section 5 is consistent with antitrust policy in general, particularly the policy underlying section 4. By easing the evidentiary burden on the private plaintiff, section 5 encourages privately initiated suits. Such suits have traditionally been regarded as essential to antitrust enforcement.<sup>74</sup> Section 5 also encourages defendants in government actions to settle cases early,<sup>75</sup> thereby reducing the strain on the thinly spread personnel of the two principal enforcement agencies.<sup>76</sup>

Having demonstrated a violation and an injury, the private plaintiff must connect them. The connection may not be indirect or tenuous.<sup>77</sup>

73. Additionally, the courts have held that *nolo contendere* pleas do not have prima facie effect. *E.g.*, *Twin Ports Oil Co. v. Pure Oil Co.*, 26 F. Supp. 366 (D. Minn. 1939).

74. On the eve of the passage of the Clayton Act, President Wilson addressed Congress in the following terms:

We shall agree in giving private individuals who claim to have been damaged by these processes the right to found their suits for redress upon the facts and judgments proved and entered in suits by the Government where the Government has upon its own initiative sued the combination complained of and won its suit . . . . It is not fair that the private litigant should be obliged to set up and establish again facts which the Government has proved. He cannot afford, he has not the power, to make use of such processes of inquiry as the Government has command of. Thus shall individual justice be done while the processes of business are rectified and squared with the general conscience.

Address of President Wilson, 63d Cong., 2d Sess., 51 CONG. REC. 1964 (1914). See *United States v. Borden Co.*, 347 U.S. 514, 518 (1954); *Quemos Theatre Co. v. Warner Bros. Pictures, Inc.*, 35 F. Supp. 949, 950 (D.N.J. 1940). See generally Wham, *Antitrust Treble-Damage Suits: The Government's Chief Aid in Enforcement*, 40 A.B.A.J. 1061 (1954). But see Breit & Elzinga, *Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble-Damages*, 17 J. L. & ECON. 329 (1974), in which the authors conclude that the efficacy of the § 4 action has been overrated; Wheeler, *Antitrust Treble-Damage Actions: Do They Work?*, 61 CALIF. L. REV. 1319 (1973).

75. For criticism of and proposals for the reform of consent decrees in antitrust prosecutions, see Zimmer & Sullivan, *Consent Decree Settlements by Administrative Agencies in Antitrust and Employment Discrimination: Optimizing Public and Private Interests*, 1976 DUKE L.J. 163; Comment, *Private Participation in Department of Justice Antitrust Proceedings*, 39 U. CHI. L. REV. 143 (1971). See also Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. §§ 16(b), (d) (1976) (providing courts with power to review proposed settlements for compliance with the public interest and requiring notice in the Federal Register).

76. See Crumpler, *An Alternative to Public and Victim Enforcement of the Federal Securities and Antitrust Laws: Citizen Enforcement*, 13 HARV. J. LEGIS. 76, 84 n.49 (1975). "The threat of a subsequent private suit has a great effect upon the defendants . . . , as is evidenced by the great propensity of alleged violators in antitrust prosecutions to agree to *nolo contendere* pleas, which cannot be raised in subsequent private litigation." *Id.* See also Blecher, *The Only Game in Town*, 8 SW. U.L. REV. 550, 555 (1976). "Perhaps it is the Department [of Justice] that in some instances first exposes the violation by reasons [*sic*] of its superior investigatory resources, but the real fear, indeed, the real deterrence, is having to pay these extraordinary sums in settlement of private litigation or risk the potential of treble damages." *Id.*

77. *E.g.*, *Long Island Lighting Co. v. Standard Oil Co.*, 521 F.2d 1269 (2d Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976). The court of appeals wrote that "even parties whose

Federal courts of appeals have established tests for determining who has standing to bring a section 4 action which turn on the proximity of the injury to the violation.<sup>78</sup> The "direct injury" test denies standing to a plaintiff whose injury is not the direct consequence of the violation.<sup>79</sup> This often depends on the nature of the relationship of the parties. For instance, one court has adopted what amounts to a "competitors only" standard, limiting recovery to competitors of the defendant.<sup>80</sup> It has been suggested that such a restrictive application of the "direct injury" test "would emasculate the treble damage remedy."<sup>81</sup> The other standing test traditionally applied by courts of appeal is the "target area" test.<sup>82</sup> As interpreted by the Second Circuit, this test depends not on the privity considerations employed by the Third Circuit's "competitors only" test, but on whether or not the plaintiff was within the area targeted by the alleged violation.<sup>83</sup> In *Mulvey v. Samuel Goldwyn Pro-*

injuries may be both immediate and foreseeable may lack standing to pursue a private remedy if that injury is indirect or incidental." 521 F.2d at 1274. The court upheld dismissal of one of several counts in an action by electric utilities against oil companies who, in boycotting Libyan and Saudi oil, had allegedly caused an increase in the price of fuel to the utilities. The court reasoned that the electric companies were mere customers and not an object of the boycott (oil distributor) and thus too tenuously connected to it to be allowed to bring a § 4 action. *Id.* at 1273.

78. See generally Sherman, *Antitrust Standing: From Loeb to Malamud*, 51 N.Y.U. L. REV. 374 (1976); Comment, *Private Plaintiff's Standing Under Clayton Act Section 4: Clothing the Naked Emperor*, 7 SETON HALL L. REV. 588 (1976).

79. E.g., *Loeb v. Eastman Kodak Co.*, 183 F.2d 704, 709 (3d Cir. 1910) (employee, director, stockholder, and creditor of company allegedly harmed by defendant's violation did not have standing).

80. *Cromar Co. v. Nuclear Materials & Equip. Corp.*, 1975-1 Trade Cas. (CCH) ¶ 60,373 (M.D. Pa. 1975). See Sherman, *supra* note 78, at 380-82.

81. Sherman, *supra* note 78, at 382.

82. For a recent comprehensive discussion of the "target area" test and an argument for its continued use, see Lytle & Purdue, *Antitrust Target Area Under Section 4 of the Clayton Act: Determination of Standing in Light of the Alleged Antitrust Violation*, 25 AM. U.L. REV. 795 (1976).

83. E.g., *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1296 & n.2 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972). The distinction between the "direct injury" test and the "target area" test in *Calderone* is not as clear as it is in the Ninth Circuit. The Second Circuit requires that the plaintiff's activities themselves be threatened by the alleged conspiracy, whereas the Ninth Circuit requires only that plaintiff be in the area foreseeably endangered by the alleged violation. Compare *Fields Prods., Inc. v. United Artists Corp.*, 318 F. Supp. 87 (S.D.N.Y. 1969), *aff'd*, 432 F.2d 1010 (2d Cir. 1970) (*per curiam*), *cert. denied*, 401 U.S. 949 (1971) with *Mulvey v. Samuel Goldwyn Prods.*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971). Both cases involved actions by motion picture producers whose contracts with the defendant distributors prohibited the use of "block booking" arrangements. Block booking ties licensing of one film to acceptance by the licensee of a block of other less desirable films. In *Fields*, the Second Circuit denied a producer standing on the ground that the "target area" included only the television stations and competitors of the block booking distributor. In

ductions,<sup>84</sup> the Ninth Circuit applied a variation of the "target area" test, which looked to the area of the economy which is threatened with harm or collapse as a result of the defendant's alleged anticompetitive behavior. If the plaintiff is within that sector of the economy, he has standing.<sup>85</sup> The Ninth Circuit, in its broad construction of "target area," introduced the element of foreseeability into the antitrust standing question.<sup>86</sup> The application of foreseeability can be criticized as making possible recovery by remotely damaged plaintiffs. On the other hand, the *Mulvey* decision strongly suggests that the plaintiff must be "hit squarely" by the effects of the alleged violation, indicating that foreseeability by itself is not sufficient to confer standing.<sup>87</sup>

The Sixth Circuit, eschewing both the "direct injury" and "target area" tests as improper considerations of the merits of the plaintiff's claim in the guise of a standing question, utilized a third test in *Malamud v. Sinclair Oil Corp.*<sup>88</sup> In *Malamud*, the court adopted the test established by the Supreme Court in *Association of Data Processing Service Organizations, Inc. v. Camp*.<sup>89</sup> This two-pronged test for use in suits challenging the actions of administrative agencies requires the plaintiff to assert injury in fact caused by the defendant and to demonstrate that the interest the plaintiff seeks to vindicate is "arguably within the zone of interests" protected by the relevant statute.<sup>90</sup> Traditionally, the courts have employed restrictive standing tests that reflect the judiciary's understandable reluctance to encourage spurious litigation and the potentially disastrous effects of recovery by remotely injured plaintiffs that may result from the rippling effect of antitrust violations. The Sixth Circuit's approach, on the other hand, gives life to the words of section 4 itself, which place no restrictions on the proximity of the plaintiff's injury, other than the requirement that it be "by reason of" the alleged violation.<sup>91</sup>

Finally, an action for treble damages requires the plaintiff to demon-

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*Mulvey*, however, the Ninth Circuit held that the producer was within the "target area" because he was directly and foreseeably affected by the alleged violation.

84. 443 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971).

85. *See id.* at 1076.

86. *Id.*

87. *Id.*

88. 521 F.2d 1142, 1148-51 (6th Cir. 1975) (standing granted to real estate companies damaged by defendant's breach of an oral agreement to provide financing in connection with the leasing of service stations).

89. 397 U.S. 150 (1970).

90. *Id.* at 153. For a criticism of the use of this standard in antitrust cases, see Sherman, *supra* note 78, at 342-405.

91. 15 U.S.C. § 15 (1976).

strate that his injury is reducible to a reasonable dollar estimation. Having proved that he suffered damages, the plaintiff may rely on some "just and reasonable inference" in calculating the dollar amount.<sup>92</sup>

If the private plaintiff has met each of the requirements outlined above, he will have established a *prima facie* case for recovery of treble damages under section 4. Assuming his action is not barred by the statute of limitations contained in section 4b,<sup>93</sup> the suit should not be dismissed on the pleadings. The cause of action under section 4 arises at the moment the plaintiff's interests are harmed or invaded by the defendant's violation.<sup>94</sup> If the harm is the result of continuous or repeated violations, a new cause of action arises each time an injury occurs and the four-year limitations period is renewed with each violation.<sup>95</sup>

The Supreme Court has ruled that when damages cannot be proved within the four-year period, the running of the statute of limitations is tolled until damages can be established.<sup>96</sup> Further softening the effect of the four-year limitations period is section 5i of the Clayton Act, which tolls the statute of limitations during the pendency, and for one year following the termination, of "any civil or criminal proceeding . . . instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws."<sup>97</sup> Section 5i operates whenever there is substantial similarity between private and governmental claims.<sup>98</sup> As long as the activities giving rise to the actions are substantially the same, it is not necessary that all the parties or issues involved be identical.<sup>99</sup> Government suits terminate when a final order is entered by consent decree, by disposition or appeal, or by the running of the period for appeal of judgment.<sup>100</sup> In addition to the tolling effect of government actions, the running of the four-year period may also be suspended

92. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) (upholding jury's estimation of damages based on the difference between prices prior to and during a conspiracy to manipulate prices).

93. 15 U.S.C. § 15(b) (1976) (four-year statute of limitations).

94. *E.g.*, *Continental-Wirt Elecs. Corp. v. Lancaster Glass Corp.*, 459 F.2d 768, 770 (3d Cir. 1972).

95. *E.g.*, *Twin-City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264 (9th Cir. 1975), *rev'd and remanded on other grounds*, 365 F. Supp. 235 (N.D. Cal. 1972).

96. *E.g.*, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 339 (1971).

97. 15 U.S.C. § 16(i) (1976). *E.g.*, *Barnett v. Warner Bros. Pictures Distrib. Corp.*, 112 F. Supp. 5, 7 (N.D. Ill. 1953). Actions for single damages by the federal government under § 4a of the Clayton Act, 15 U.S.C. § 15a (1976), do not toll the statute.

98. *E.g.*, *Leh v. General Petroleum Corp.*, 382 U.S. 54, 63 (1965).

99. *Michigan v. Morton Salt Co.*, 259 F. Supp. 35, 54 (D. Minn. 1966), *aff'd on other grounds sub nom. Hardy Salt Co. v. Illinois*, 377 F.2d 768 (8th Cir.), *cert. denied*, 389 U.S. 912 (1967).

100. *Russ Togs, Inc. v. Grinnell Corp.*, 426 F.2d 850, 857 (2d Cir.), *cert. denied*, 400 U.S. 878 (1970).

during periods in which the defendant has fraudulently concealed the violation from the plaintiff.<sup>101</sup> Duress,<sup>102</sup> dominance,<sup>103</sup> or infancy<sup>104</sup> may also cause the tolling of the statute.

### III. THE CLASS ACTION UNDER FEDERAL RULE 23

Rule 23 of the Federal Rules of Civil Procedure, as amended, authorizes the maintenance of class actions.<sup>105</sup> In providing the possibility of redress to many plaintiffs whose individual injuries are small, the class action has been hailed as "one of the most socially useful remedies in history."<sup>106</sup> The deterrent value of the class action has also been widely proclaimed. Other commentators, particularly among the defendant's bar, have had harsh words for the class action, terming it, for example, "a form of legalized blackmail" making "the only significant issue . . . the size of the ransom to be paid for total peace."<sup>107</sup> The most serious criticism of the class action, particularly as it has been used in private antitrust suits, concerns its alleged tendency to sacrifice the defendant's substantive rights in the interest of procedural efficiency and judicial economy.<sup>108</sup>

In order to maintain a class action, the potential class representative must demonstrate compliance with the requirements of rule 23. Subsection (a) requires that:

- (1) joinder be impracticable because of the large number of class members;
- (2) there be common questions of law or fact;

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101. *E.g.*, *Public Serv. Co. v. General Elec. Co.*, 315 F.2d 306, 310-12 (10th Cir. 1963) (fraudulent concealment of price-fixing by electrical equipment manufacturers tolled statute of limitations). *Accord*, *Atlantic City Elec. Co. v. General Elec. Co.*, 312 F.2d 236 (2d Cir. 1962); *Kansas City v. Federal Pac. Elec. Co.*, 310 F.2d 271 (8th Cir. 1962).

102. *E.g.*, *Miller Motors, Inc. v. Ford Motor Co.*, 149 F. Supp. 790 (M.D.N.C. 1957), *aff'd*, 252 F.2d 441 (4th Cir. 1958).

103. *E.g.*, *International Rys. v. United Fruit Co.*, 373 F.2d 408 (2d Cir.), *cert. denied*, 387 U.S. 921 (1967).

104. *Cf.* *Hall v. E.I. duPont de Nemours & Co.*, 312 F. Supp. 358, 361-62 (E.D.N.Y. 1970) (suit dismissed when plaintiffs failed to show that infants could not have timely sued through a guardian).

105. FED. R. CIV. P. 23. The 1966 amendment made inclusion of class members in a (b)(3) action automatic rather than dependent on an affirmative act as under the old rule. *See* 3B MOORE'S FEDERAL PRACTICE ¶ 23.02-1 (2d ed. 1977).

106. Pomerantz, *New Developments In Class Actions—Has Their Death Knell Been Sounded?*, 25 BUS. LAW. 1259 (1970).

107. Handler, *The Shift From Substantive to Procedural Innovations In Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971).

108. Pollock, *Class Actions Reconsidered: Theory and Practice Under Amended Rule 23*, 28 BUS. LAW. 741, 746 *passim* (1973). Examples include the right to confront adverse witnesses and to require plaintiffs to prove damages individually.

- (3) the claims of the representative be typical of the claims of the class;<sup>109</sup> and
- (4) the class representative fairly and adequately represent the class.<sup>110</sup>

Initially, the prospective class representative must show both that a class exists and that he is a member of that class.<sup>111</sup> Next, he must convince the court that the large number of class members makes joinder impracticable.<sup>112</sup> There is very little consistency in the case law regarding the number necessary to make that showing.<sup>113</sup> Classes have been certified with as few as twenty-five members,<sup>114</sup> but denied with as many as three hundred.<sup>115</sup> The requirement that there be common questions of law or fact<sup>116</sup> is likely to be met whenever the class members stand in similar relationships to and have been similarly harmed by the defendant.<sup>117</sup> Dissimilarity in the business relationships between various class members and the defendant is likely to result in denial of class certification.<sup>118</sup> The prospective representative must be prepared at the outset to give the court some approximate idea of the number of members included in the class he purports to represent.<sup>119</sup>

The third requirement imposed on the aspiring class representative is a showing that the claims made are typical of those of the class.<sup>120</sup> This

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109. Alternatively, since it is possible to have a class of defendants, the defenses advanced by the representative must be typical. *E.g.*, *Research Corp. v. Pfister Assoc. Growers, Inc.*, 301 F. Supp. 497 (N.D. Ill. 1969) (over 400 defendants made up the class).

110. FED. R. CIV. P. 23.

111. *Abercrombie v. Lum's, Inc.*, 345 F. Supp. 387, 393 (S.D. Fla. 1972), *aff'd*, 531 F.2d 775 (5th Cir. 1976).

112. FED. R. CIV. P. 23(a)(1).

113. *See generally* VON KALINOWSKI, *supra* note 13, at § 108.02(2) and cases cited therein.

114. *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452 (E.D. Pa. 1968).

115. *Minersville Coal Co. v. Anthracite Export Ass'n*, 55 F.R.D. 426 (M.D. Pa. 1971).

116. FED. R. CIV. P. 23 (a)(2).

117. *E.g.*, *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968). Eisen was an investor suing odd-lot brokers on behalf of himself and other investors for injuries caused by alleged illegal surcharges. The class was subsequently held to be unmanageable. 479 F.2d 1005 (2d Cir. 1973), *aff'd on other grounds*, 417 U.S. 156 (1974).

118. *E.g.*, *Thompson v. T.F.I. Cos.*, 64 F.R.D. 140 (N.D. Ill. 1974) (the prospective class representative was a former franchisee who sought to represent a class including present franchisees).

119. *E.g.*, *Sims v. Parke-Davis & Co.*, 334 F. Supp. 774, 781 (E.D. Mich. 1971), *aff'd*, 453 F.2d 1259 (6th Cir. 1971), *cert. denied*, 405 U.S. 978 (1972) (denial of class status to class of prisoners in state penal institutions because counsel failed to provide court with information "from which the approximate number of class members can be ascertained." *Id.* at 781).

120. FED. R. CIV. P. 23(a)(3).



requirement has been regarded as duplicative by both courts<sup>121</sup> and commentators<sup>122</sup> because satisfaction of either rule 23(a)(2)'s commonality requirement or the adequacy of representation requirement of rule 23(a)(4) would seem sufficient. Clearly, if the primary claim of a prospective representative were atypical, he would almost certainly be disqualified because of his incapacity to represent the class adequately under (a)(4). The issue of typicality, like the question of commonality under (a)(2), is often answered by reference to the business relationship of the putative class with the defendant.<sup>123</sup> Differences in the amount of damages or volume of business are not likely, however, to be dispositive of the typicality question if the basis for the damages is the same for all class members.<sup>124</sup>

The final requirement of rule 23(a) is that the prospective class representative be in a position to protect adequately the interests of the class as a whole.<sup>125</sup> Because of the binding effect of a final judgment on all members of the class, the courts have recognized their duty to evaluate carefully a prospective representative's ability to act as champion of the class's cause.<sup>126</sup> Among the factors considered in such an evaluation are the qualifications and experience of the representative's legal counsel<sup>127</sup> and the possibility of conflicts of interest between the representative and other members of the class.<sup>128</sup> If there is some doubt as to whether potential conflicts exist, the court may certify the class subject to revocation of certification if the conflict materializes.<sup>129</sup> On the other hand, the party seeking to represent the class need not demonstrate that the members of the class unanimously approve of his representation.<sup>130</sup> In the typical treble damage class action (certified under 23(b)(3)), class members who wish to exclude themselves may do so, and their decision

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121. *E.g.*, *Ungar v. Dunkin' Donuts of America, Inc.*, 68 F.R.D. 65, 136 (E.D. Pa. 1975), *rev'd on other grounds*, 531 F.2d 1211 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976).

122. *E.g.*, 3B MOORE'S FEDERAL PRACTICE ¶ 23.06-1, at 23-301 (2d ed. 1977).

123. *E.g.*, *Seligson v. Plum Tree, Inc.*, 55 F.R.D. 259, 262 (E.D. Pa. 1972), *class certification revoked on other grounds*, 61 F.R.D. 343 (E.D. Pa. 1973) (plaintiff's allegation that class of franchisees all had similar agreements with franchisor sufficient on typicality issue).

124. *E.g.*, *Philadelphia v. American Oil Co.*, 53 F.R.D. 45, 67-68 (D.N.J. 1971).

125. FED. R. CIV. P. 23(a)(4).

126. *E.g.*, *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562-63 (2d Cir. 1968).

127. *Id.*

128. *E.g.*, *National Auto Brokers Corp. v. General Motors Corp.*, 376 F. Supp. 620, 636-37 (S.D.N.Y. 1974) (denial of class status because of pending lawsuits between members of class).

129. FED. R. CIV. P. 23 (c). *E.g.*, *Siegel v. Chicken Delight, Inc.*, 271 F. Supp. 722, 728 (N.D. Cal. 1967) (class certification conditional and subject to further orders of court).

130. *See, e.g.*, *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 563 (2d Cir. 1968).

to do so in small numbers will not affect the ability of the representative to achieve certification.<sup>131</sup>

While rule 23(a) lists four conditions which the plaintiff must meet in order to maintain a class action, 23(b) indicates the four situations in which a class action is appropriate.<sup>132</sup> Rule 23(b)(1)(A) permits a class action if there is the danger that separate litigation of the members' claims might result in inconsistent or contradictory results.<sup>133</sup> Rule 23(b)(1)(B) concerns the detrimental effect on potential class members of separate adjudications in which they were not represented.<sup>134</sup> Section (1)(B) thus applies to "situations where the judgment in a non-class action by or against an individual member of the class, while not technically including the other members, might do so as a practical matter."<sup>135</sup> Separately and in concert, rules 23(b)(1)(A) and (b)(1)(B) require a significant risk that potential class members or the party opposing the class would be prejudiced by denial of class certification.

The second situation in which a class action is appropriate is when the class is defined by the actions of the party opposing it. In this situation, the rule speaks in terms of injunctive or declaratory relief.<sup>136</sup> Although damages may also be awarded, the principal relief sought must be equitable.<sup>137</sup>

Antitrust class actions are predominantly of the type authorized by rule 23(b)(3).<sup>138</sup> The (b)(3) action is appropriate when there exist among the members of the class common questions of law or fact which predominate over other questions and the class action is superior to other methods of bringing the action.<sup>139</sup> This means that members' claims must share a central and predominant core issue. The second half of the (b)(3) requirement, that the class action be superior to other methods of adjudicating the matter, requires that alternatives such as joinder and consolidation be found less conducive to the goal of promoting "uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."<sup>140</sup> The

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131. See FED. R. CIV. P. 23(c)(2).

132. FED. R. CIV. P. 23(b).

133. FED. R. CIV. P. 23(b)(1)(A).

134. FED. R. CIV. P. 23(b)(1)(B).

135. *Id.*, advisory committee notes to 1966 amendments.

136. FED. R. CIV. P. 23(b)(2).

137. *E.g.*, *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867, 900 (S.D.N.Y. 1975) (denial of class status because members of the class found to be more interested in damages than in injunctive relief).

138. *E.g.*, *Al Barnett & Sons v. Outboard Marine Corp.*, 64 F.R.D. 43, 47 n.2 (D. Del. 1974). See also Annot. 6 A.L.R. FED. 348 (1971).

139. See FED. R. CIV. P. 23(b)(3).

140. FED. R. CIV. P. 23(b)(3) and advisory committee notes to 1966 amendments.

rule lists four considerations relevant to the findings required, namely, the possibility that individual members may have an interest in controlling the conduct of litigation individually, the existence of pending litigation involving related issues or parties, the desirability of a single forum for the litigation of all claims, and the difficulties to be expected in managing the class.<sup>141</sup>

Rule 23 (c)(2) requires that in a (b)(3) action the potential class members must be given "the best practicable notice under the circumstances, including individual notice to all members who can be identified through reasonable effort."<sup>142</sup> The Supreme Court, in the famous *Eisen v. Carlisle & Jacquelin* decision,<sup>143</sup> held that the notice requirement is absolute and that the expense of such notification must be borne by the plaintiff.<sup>144</sup> The effect of this decision has been to diminish substantially the value of the (b)(3) action as a tool for the vindication of individually small injuries to large numbers of plaintiffs. As in *Eisen*, the expense of notice to the typically numerous identifiable members of the class is certain in many, if not most, (b)(3) actions to render the action beyond the means of the class representative. However, while the effect of the *Eisen* decision should not be underestimated, the class action is by no means useless in redressing injury to large groups of consumers caused by antitrust violations. As Justice Douglas noted in his partial dissent in *Eisen*,<sup>145</sup> subdivision (c)(4)(B) of the rule permits creation of subclasses.<sup>146</sup> By limiting the size of the class in this manner, it should be possible to reduce the burdensome effect of notice to manageable proportions. Power to divide a class once certified resides in the court.<sup>147</sup> Careful consideration of the expense to be anticipated in notifying identifiable class members by counsel could result in carefully tailored classes. In this manner, the plaintiffs in an antitrust class action can test the water without expending huge sums on notice prior to any judicial consideration of the merits of their cases.

Alternatively, if injunctive relief is the major remedy sought by the class, subdivision (b)(2) may be utilized.<sup>148</sup> If, on the other hand, the plaintiffs stand in a uniform legal or contractual relationship to the defendant, so that inconsistent results in lawsuits brought by individual

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141. *Id.*

142. FED. R. CIV. P. 23(c)(2).

143. 417 U.S. 156 (1974).

144. *Id.* at 177.

145. *Id.* at 179 (Douglas, J., dissenting).

146. See FED. R. CIV. P. 23(c)(4)(B).

147. *E.g.*, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 181 (1974) (Douglas, J., dissenting).

148. FED. R. CIV. P. 23(b)(2).

class members would "establish incompatible standards of conduct"<sup>149</sup> for the defendant, the plaintiffs may avail themselves of subdivision (b)(1)(A).<sup>150</sup> Despite a few aberrant decisions,<sup>151</sup> however, the great weight of authority holds that (b)(1) and (b)(2)<sup>152</sup> are not appropriate for the maintenance of antitrust actions.<sup>153</sup>

#### IV. THE EFFECTIVENESS OF SECTION 4 IN COMPENSATING VICTIMS AND DETERRING OFFENDERS

The effectiveness of the antitrust treble damage action has been the subject of lively debate during the last decade.<sup>154</sup> The policy underlying section 4 is a combination of solicitude for the injured citizen and a recognition of the inadequacy of the government's enforcement apparatus to either detect or deter most violations.<sup>155</sup> Traditionally, not only was the effectiveness of the treble damage provision almost universally accepted, but it was also assumed that the remedy was necessary to effectuate the policy underlying the antitrust laws.<sup>156</sup> According to the traditional view, the consumer and the competitor are sufficiently encouraged by the prospect of a treble damage recovery to act as a supplementary force of antitrust enforcers. Doubt has been cast, however, on both the deterrent and compensatory value of the treble damage action.<sup>157</sup>

Underlying this skepticism about section 4's deterrent and compensatory value are several contentions. Because of the difficulty of proving a violation except for cases in which there is a prior judgment against the defendant in a government action, the typical private action follows a government action rather than turning over virgin antitrust soil. Indeed, one commentator was moved to comment: "We may be witnessing almost a reversal of the traditional roles. The private antitrust remedy was designed as a supplement to the government remedy . . . . But today it is at least a debatable question as to what is supplementing

149. FED. R. CIV. P. 23(b)(1)(A).

150. *Id.*

151. *E.g.*, *Minnesota v. United States Steel Corp.*, 44 F.R.D. 559 (D. Minn. 1968).

152. FED. R. CIV. P. 23(b)(1) & (2).

153. Annot., 6 A.L.R. FED. 45 (1971).

154. *See, e.g.*, *Antitrust Symposium: The Effectiveness of the Private Treble Damage Action as an Antitrust Enforcement Mechanism*, 8 SW. U.L. REV. 505 (1976) and articles collected therein.

155. *See, e.g.*, *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968).

156. *See* Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167 (1958). *But see* Breit, *Efficiency and Equity Considerations*, 8 SW. U. L. REV. 539 (1976).

157. *See, e.g.*, Breit & Elzinga, *supra* note 74.

what."<sup>158</sup> Although by far the greater number of modern private treble damage actions may bear a parasitic relationship to government actions, other commentators have stated that because of official reluctance to pursue certain types of violations or violations in certain sectors of the economy, the need for the private action continues.<sup>159</sup> Additionally, the Justice Department, which is the primary arm of the government in antitrust enforcement, frequently reaffirms its support of the private action as a necessary and desirable addition to the government's efforts.<sup>160</sup>

A second criticism frequently leveled at the section 4 action, especially when brought by a class under rule 23, is that it is often plaintiffs' attorneys who benefit substantially from such actions rather than the victims.<sup>161</sup> Probably the most famous treble damage class action was *Eisen v. Carlisle & Jacquelin*.<sup>162</sup> That case, which involved a class of some 6,000,000 members, was finally declared unmanageable, but would have resulted in an average recovery of only \$3.90 per class member after trebling.<sup>163</sup> Small individual recoveries coupled with large attorney's fees are frequently cited by critics of the treble damage provision.<sup>164</sup> It is by no means clear, however, that such cases are the rule, or that because an individual's injury is insignificant in relation to the injury to the class, the individual should be without a remedy. To argue that the administrative costs of a treble damage class action are very high, or that attorneys make large fees while victims receive paltry recoveries, does not rebut the equitable principle that an injury deserves a remedy. Even to say that under the existing system consumers often fail to recover because of difficulties with notice in class actions is an indictment not of the compensatory goal of section 4, but of the imperfect procedural mechanisms for realizing that goal.

The principal arguments advanced by critics of the section 4 action focus on two points:<sup>165</sup> judicial efficiency is ill-served by encouraging suits of the size and complexity of many section 4 actions, and the treble

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158. Pollock, *Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine*, 32 ANTITRUST L.J. 5, 5 (1966).

159. Blecher, *supra* note 76, at 556. The author, a distinguished antitrust attorney, states that "there are substantial and important segments of the enforcement effort that are simply not undertaken by the government . . . because, individually, they do not have overriding public significance." *Id.*

160. Rashid, *A Government Perspective*, 8 SW. U.L. REV. 515 (1976).

161. Wheeler, *supra* note 74, at 1337-40.

162. 52 F.R.D. 253 (S.D.N.Y. 1971), *rev'd*, 479 F.2d 1005 (2d Cir. 1973), *aff'd on other grounds*, 417 U.S. 156 (1974).

163. 479 F.2d at 1010.

164. See, e.g., Handler, *supra* note 107, at 9.

165. E.g., Breit & Elzinga, *supra* note 74; Wheeler, *supra* note 74.

damage action imperfectly effects the goal of compensating the consumer victims of antitrust violations. While neither point is without merit, both fail to meet head-on the arguments in favor of the remedy provided by section 4. A third criticism is founded on the questionable assertion that corporate managers are likely to be deterred by the amount of the possible fine, rather than by the likelihood of being caught. From this assumption the critics conclude that the most efficient deterrent would be a very heavy fine regardless of the chances of detection and prosecution.<sup>166</sup> The policy of section 4, however, is directed not only at deterrence but also at compensation of victims. The object ought to be to maximize both without sacrificing either. Assuming *arguendo* that little compensation occurs, the solution should be to facilitate, not eradicate, compensation.

Various procedural means of easing the plaintiff's burden—more realistic notice requirements in 23(b)(3) actions, permitting offensive use of the passing-on theory,<sup>167</sup> less prohibitive standing tests (such as the broad "target area" test of the Ninth Circuit,<sup>168</sup> or the "zone of interest" test adopted by the Sixth Circuit<sup>169</sup>), more extensive inclusion of *nolo contendere* pleas and consent decrees within the *prima facie* evidence presumption of section 5i of the Clayton Act—would make compensation more available while increasing the deterrent effect of section 4 actions.<sup>170</sup> Certainly none of these suggestions is without its drawbacks. Any suit requires the expenditure of scarce judicial resources and to some extent entails an imperfect allocation of damages. If compensation of the individual injured by antitrust violations is an unattainable goal, fluid recovery such as that envisioned by the *parens patriae* act,<sup>171</sup>

166. *Id.*

167. The "passing-on" theory used offensively would allow consumers to sue because the illegal overcharge borne by the retailer was passed on to them. See subsection V *infra* for discussion of this concept. *Contra*, *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

168. *E.g.*, *Mulvey v. Samuel Goldwyn Prods.*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971). See notes 84-87 & accompanying text *supra*.

169. See notes 88-91 & accompanying text *supra*.

170. On the other hand, giving *prima facie* effect to *nolo* pleas and consent decrees would very likely decrease the government's success in obtaining them and consequently reduce the government's effectiveness. To that extent, the deterrent might be reduced because of the diminished likelihood that the government would be able to bring as many suits as is now the case. However, the increased possibility of treble damage actions being brought in the wake of such government actions as could be brought would probably counteract the reduced deterrent effect attributable to fewer actions by the government.

171. Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1390 (amending 15 U.S.C. § 15 (1976)). Section 4e of the Act requires that potential claimants be given a chance to assert their claims against the fund created by aggregating damages. Following disbursement to those with legitimate claims, the court is given discretion over the disbursement of remaining sums for some public purpose beneficial to the class injured.

discussed below, may provide both substantial deterrence and meaningful compensation. Such compensation might be in the form of reduced prices in the relevant commodity, lower taxes, or contribution to some general public purpose. In any case, reducing deterrence by curtailing private plaintiff actions because compensation is imperfect has little to recommend it either as good policy or good sense. Until alternative means which are superior to the section 4 action are suggested to maximize both deterrence and compensation, calls for the repeal of the treble damage provision are premature.

#### V. PASSING-ON REVISITED

In a recent case, *Illinois Brick Co. v. Illinois*,<sup>172</sup> the Supreme Court cast a serious impediment in the path of the consumer seeking to redress injury caused by an antitrust violation. By a six to three majority, the Court held that indirect purchasers are precluded from seeking damages despite proof that an illegal overcharge was passed on to them.<sup>173</sup> The Court, speaking through Justice White, based its decision on the ruling in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,<sup>174</sup> in which it had held that the defendant could not escape liability for antitrust violations on the theory that plaintiff had passed on any increased cost to consumers.<sup>175</sup> The *Hanover Shoe* decision was ostensibly based on two considerations: (1) the increased complexity caused by attempts to prove passing-on through extended chains of distribution,<sup>176</sup> and (2) the likelihood that few remote purchasers would sue because of the small size of their individual injuries. The result would be that violators "would retain the fruits of their illegality" and the effectiveness of treble damage actions would be substantially diminished.<sup>177</sup>

Justice White, writing for the majority in *Illinois Brick*,<sup>178</sup> initially disposed of arguments for unequal application of the passing-on theory

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The committee considered and squarely rejected arguments that this method of applying damage recoveries . . . is unconstitutional. Once it is acknowledged that the antitrust violator has no constitutional right to retain the profits of his illegal activity, it becomes clear that he has no constitutionally protected interest in how those profits are distributed for the benefit of those whom he has injured. . . . The only alternative—retention of the profits by the adjudicated wrongdoer—is unconscionable and unacceptable. (citations omitted)

H.R. No. 499, 94th Cong., 2d Sess. 16, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2572, 2586.

172. 431 U.S. 720 (1977).

173. *Id.* at 736.

174. 392 U.S. 481 (1968).

175. *Id.* at 494.

176. *Id.* at 492-93.

177. *Id.* at 494.

178. Justice White also wrote the majority opinion in *Hanover Shoe*.

on the ground that permitting offensive but not defensive use would expose defendants to multiple liability. He further indicated that because the principal rationale of *Hanover Shoe* was the increased complexity inherent in proving passing-on, that case provided no justification for its differential application.<sup>179</sup> After turning aside arguments for unequal application, Justice White addressed the suggestion that *Hanover Shoe* be limited or overturned.<sup>180</sup> This suggestion was declined for two reasons,<sup>181</sup> namely, the threat of increased complexity presented by permitting proof of passing-on in multiparty actions<sup>182</sup> and the reduced effectiveness of treble damage actions which would allegedly be caused by permitting more than one plaintiff to sue.<sup>183</sup>

Justice Brennan, dissenting, argued that the majority decision was contrary to the actual rationale of *Hanover Shoe*,<sup>184</sup> the congressional purpose in passing section 4 of the Clayton Act,<sup>185</sup> and Title III of the Antitrust Improvements Act of 1976.<sup>186</sup> The primary basis for the *Hanover Shoe* decision, according to Justice Brennan, was a concern for the effectiveness of the antitrust laws and the fear that, by pleading passing-on, a defendant would be permitted to keep its ill-gotten gains.<sup>187</sup> Consequently, he concluded that that case did not stand for the proposition that passing-on may never be introduced into a section 4 action, but for the more limited rule that a defendant may not frustrate the antitrust laws by asserting it defensively. Because the middleman's incentive to pass on overcharges is great and his incentive to jeopardize business by suing his supplier is small, the Court's decision is actually contrary to the policy of encouraging enforcement of the antitrust laws.<sup>188</sup>

The dissenters' view was given credence by Congress' passage of the Antitrust Improvements Act of 1976.<sup>189</sup> Title III of the Act permits a state to maintain a section 4 action on behalf of its residents who have been injured by a violation of the antitrust laws. Congress' concern for the ultimate consumer is evident in this legislation. As Justice Brennan

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179. *Illinois Brick Co. v. Illinois*, 431 U.S. 729-35.

180. *Id.* at 736-47.

181. In addition, the Court relied upon stare decisis. *Id.* at 736-37.

182. *Id.* at 737-45.

183. *Id.* at 745-47.

184. *Id.* at 750-54 (Brennan, J., dissenting).

185. *Id.* at 749, 754-56.

186. *Id.* at 749, 756-58.

187. *Id.* at 751-52 (citing *Hanover Shoe Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 492-94 (1968)). But see *Illinois Brick Co. v. Illinois*, 431 U.S. at 731-35.

188. *Illinois Brick Co. v. Illinois*, 431 U.S. at 764-65 & nn. 23 & 24 (Brennan, J., dissenting).

189. 15 U.S.C. § 15 (1970), as amended by Antitrust Improvements Act of 1976, Pub. L. No. 94-435 §§ 301-304, 90 Stat. 1396.



wrote, "[I]t is clear the new Act is intended to provide a remedy for injured consumers whether or not they purchased directly from the violator."<sup>190</sup>

The dissent also demonstrated that the prospect of multiple liability, relied on by the majority as the linchpin of their decision, is not as ominous as the majority suggests. The four-year statute of limitations, res judicata and collateral estoppel, procedures for joinder, consolidation, interpleader, and the transfer of complex actions to a single federal district, render the prospect of multiple recoveries extremely remote.<sup>191</sup> Finally, implicit in the majority's argument is the untenable proposition that the administrative inconvenience of fashioning additional procedural mechanisms to prevent unfair duplicative recovery outweighs the rights of victims to be made whole by the party who has injured them.<sup>192</sup> Given the combined policies of deterrence and compensation underlying section 4, a better argument can be made for risking multiple liability in the odd case than for creating an irrebutable presumption that a plaintiff, other than a direct purchaser, can never meet the burden of proving that he was injured. In response to the argument advanced by the majority that permitting the offensive use of the passing-on theory would result in an unacceptable level of complexity, Justice Brennan pointed out that most antitrust cases are, by nature, extremely complicated proceedings.<sup>193</sup>

If there were no alternative to overturning *Hanover Shoe* in order to permit recovery by the real victims of many antitrust violations, it is clear that the antitrust laws and the congressional policy which they reflect require nothing less. The argument that by denying the use of the passing-on theory judicial economy is accomplished is not compelling. What recommends the *Hanover Shoe* decision is that it increases the

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190. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 756-57 (1977).

191. *Id.* at 761-64. See also McGuire, *The Passing-On Defense and the Right of Remote Purchasers to Recover Treble Damages Under Hanover Shoe*, 33 U. PITT. L. REV. 177, 197-202 (1971); Comment, *Standing To Sue In Antitrust Cases: The Offensive Use of Passing On*, 123 U. PA. L. REV. 976, 993-98 (1975).

192. Justice White wrote, "The apportionment of the recovery throughout the distribution chain would increase the overall costs of recovery by injecting extremely complex issues into the case; at the same time such an apportionment would reduce the benefits to each plaintiff by dividing the potential recovery among a much larger group." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745 (1977). This reasoning is, of course, fantastic. First of all, an apportionment would *increase* the benefits to everyone except the direct purchaser, since under the Court's decision only the latter can recover at all. Secondly, it is arguable that some increase in the cost of litigation is not too high a price to pay for putting the damages in the injured party's pocket rather than providing an uninjured party with a windfall.

193. *Id.* at 758 & n.14. See generally Lanzillotti, *supra* note 70, at 330-32; Pollock, *The "Injury" and "Causation" Elements of a Treble-Damage Antitrust Action*, 57 NW. U.L. REV. 691, 695 (1963).

deterrent effect of the antitrust statutes by making treble damage liability more likely to arise from their violation.<sup>194</sup>

Class and *parens patriae* actions hold the potential for widespread recovery by ultimate consumers. Under the circumstances, the *Illinois Brick* decision can only be regarded as obstructionist judicial legislation. By passing the Antitrust Improvements Act, Congress has indicated that it believes the consumer should have a remedy. In the words of Justice Brennan, "It is difficult to see how Congress could have expressed itself more clearly."<sup>195</sup> Justice Brennan's concluding paragraph succinctly states the extent of the damage done by the *Illinois Brick* decision:

The Court today regrettably weakens the effectiveness of the private treble-damage action as a deterrent to antitrust violations by, in most cases, precluding consumers from recovering for antitrust injuries. For in many instances, consumers, although indirect purchasers, bear the brunt of antitrust violations. To deny them an opportunity for recovery is particularly indefensible when direct purchasers, acting as middlemen, and ordinarily reluctant to sue their suppliers pass on the bulk of their increased costs to consumers farther along the chain of distribution. Congress has given us a clear signal that § 4 is not to be read to have the restrictive scope ascribed to it by the Court today.<sup>196</sup>

Unfortunately, as Justice Blackmun wrote in his *Illinois Brick* dissent, we must look to congressional action to undo the harm done by the "wooden" approach of the majority.<sup>197</sup>

## VI. *PARENS PATRIAE* ACTIONS

The *parens patriae* concept derives from the early common law.<sup>198</sup> The Crown was understood to have retained from feudal times the authority to act as guardian of subjects incapable of protecting their own interests such as infants and the insane. In the United States, the concept of *parens patriae*, passed from the Crown to the individual states, has undergone a process of extension.<sup>199</sup> A series of cases has established the

194. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 753 (1977) (Brennan, J., dissenting).

195. *Id.* at 758. See also *id.* at 764 n.23.

196. *Id.* at 764-65 (footnotes omitted).

197. *Id.* at 766 (Blackmun, J., dissenting).

198. See generally Malina & Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 NW. U.L. REV. 193 (1970); Note, *State Protection of Its Economy and Environment: Parens Patriae Suits for Damages*, 6 COLUM. J.L. & SOC. PROB. 411 (1970).

199. Originally the royal prerogative permitted the Crown to act as the guardian of subjects under a legal disability, such as infancy or insanity, and as superintendent of

right of the states to sue in a *parens patriae* capacity to vindicate quasi-sovereign interests.<sup>200</sup> Because the interest protected must be quasi-sovereign, states are prevented from asserting the legal rights of particular individuals legally capable of maintaining an action themselves. Consequently, the state must allege injury to itself and to its citizens generally, making clear that "[the state] has an interest apart from that of particular individuals who may be affected."<sup>201</sup>

In *Georgia v. Pennsylvania Railroad*,<sup>202</sup> the Supreme Court affirmed the right of the state to bring an action to enjoin railroads from discriminating against Georgian shippers in freight rates. Although Georgia sought damages as well as injunctive relief, the Court disposed of the damage issue in favor of the railroad on the ground that the rates charged by the railroads had been approved by the Interstate Commerce Commission and an award of damages would consequently constitute an illegal rebate.<sup>203</sup> The plain implication of the language and logic of *Georgia* is that, absent the Interstate Commerce Commission's primary jurisdiction, the Court would not have dismissed the state's prayer for damages. The Court thus implicitly recognized the principle that damages are an appropriate remedy in *parens patriae* actions.<sup>204</sup> Twenty-seven years after *Georgia*, the Court held, in *Hawaii v. Standard Oil Co.*,<sup>205</sup> that the

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"charitable uses." In the United States, the states began to assert, and the Supreme Court to exercise jurisdiction over, claims involving quasi-sovereign considerations such as boundaries and other matters affecting the general welfare of their citizens. Cases in which states were held to have *parens patriae* standing to protect such quasi-sovereign interests included *Louisiana v. Texas*, 176 U.S. 1 (1899), which involved a dispute over Texas' use of the quarantine to exclude from its ports good shipped out of New Orleans; *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), in which Georgia sought to enjoin a factory in Tennessee from releasing sulphurous acid gas which soon made its way into Georgia; and *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945), in which the state sought damages and injunctive relief for alleged price-fixing by the railroads which discriminated against Georgian shippers. Cases in which *parens* standing was denied include *New Hampshire v. Louisiana*, 108 U.S. 76 (1883) (consolidated with *New York v. Louisiana*), in which the Court invalidated state statutes which gave state officials the power to act as assignees of the causes of action of citizens; *Oklahoma v. Atchison, Topeka & Santa Fe R.R.*, 220 U.S. 277 (1911), involving alleged discriminatory rates charged to shippers of the state; and *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), in which the state sought damages on behalf of its citizens for injury to the general economy of the state.

200. See cases cited in note 199 *supra*.

201. *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 451 (1945).

202. 324 U.S. 439 (1945).

203. *Id.* at 452-53. *Contra*, *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 260 (1972) (Court concluded that *Georgia* had left the issue of damages open).

204. See *Hawaii v. Standard Oil Co.*, 405 U.S. at 271-73 (Brennan, J., dissenting).

205. 405 U.S. 251 (1972) (39 states submitted amici briefs supporting Hawaii).

state could not seek treble damages as *parens patriae* for injury to its economy caused by antitrust violations in the distribution of petroleum products. The majority in *Hawaii* reasoned that injury to the state's economy was "no more than a reflection of injuries to the 'business or property' of consumers, for which they may recover themselves under section 4."<sup>206</sup> In response to the state's argument that individual consumers are impotent to redress individually small antitrust injuries, the majority directed consumers to the class action.<sup>207</sup> If injuries such as that pleaded by Hawaii were to be afforded redress under section 4, the majority stated, "we should insist upon a clear expression of a congressional purpose."<sup>208</sup>

A similar question, whether a state can sue as *parens patriae* for injuries to its citizens' business or property, was addressed by the Ninth Circuit in *California v. Frito-Lay, Inc.*<sup>209</sup> The state argued that the practical inability of individual consumers to obtain redress for antitrust violations created a situation analogous to the *parens patriae* role of guardian for those with legal disabilities. Although the court praised the state's attempt to find a solution to the problem of consumers' antitrust remedies, it held that the common law concept of *parens patriae* provided no authority for an action such as the state contemplated. The court was also reluctant to usurp the legislative prerogative.

It was in the aftermath of the *Frito-Lay* decision that Congress passed the Antitrust Improvements Act.<sup>210</sup> Title III of the Act authorizes state attorneys general to "bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State" who have been injured by violations of the Sherman Act.<sup>211</sup> Amounts allocable to business or to persons exercising the option of being excluded are not included in the recovery.<sup>212</sup> The state is entitled to recover treble the amount of damages sustained by persons properly included in such an action, costs, and a reasonable attorney's fee.<sup>213</sup> The attorney general of the state is required to give notice of the action by publication unless

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206. *Id.* at 264.

207. This advice is curious in light of the subsequent *Eisen* and *Illinois Brick* decisions limiting the utility of the class action to consumers.

208. 405 U.S. at 264.

209. 474 F.2d 774 (9th Cir.), *cert. denied*, 412 U.S. 908 (1973).

210. Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (amending 15 U.S.C. § 15 (1976)). For the legislative history of the Act, see H.R. REP. NO. 499, 94th Cong., 2d Sess. 5, 8, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2572, 2574-75, 2577-78.

211. 15 U.S.C. § 15(c)(a)(1) (1970).

212. *Id.*

213. *Id.* at § 15(c)(a)(2).

the court determines that due process requires additional notice.<sup>214</sup> The notice must inform recipients that they can be excluded by seasonably advising the court of their desire for exclusion.<sup>215</sup> With the exception of persons and businesses excluded from the action, a final judgment is res judicata with respect to any section 4 claim.<sup>216</sup> Dismissal or compromise of an action brought under the Act requires the approval of the court and such notice as the court directs.<sup>217</sup> An unusual provision of the Act, designed to assuage fears of nuisance suits by state officials with ulterior motives, is the award of attorney's fees to the defendant if the court finds that the "State attorney general has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."<sup>218</sup>

In an effort to avoid the need to prove the amount of damages to each individual, the Act permits the computation of damages "in the aggregate by statistical or sampling methods, by the computation of illegal over-charges, or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit."<sup>219</sup> Damages recovered may be distributed according to the court's direction or be treated as a civil penalty "deposited with the State as general revenues."<sup>220</sup> In either event, a person on whose behalf the suit was brought must be afforded a reasonable opportunity "to secure his appropriate portion of the net monetary relief."<sup>221</sup> Finally, the Act directs the Attorney General of the United States to notify the attorney general of any state having an interest, of any antitrust actions brought by the Justice Department, and to make the Department's investigative files available for use in *parens patriae* actions.<sup>222</sup>

Since its enactment on September 30, 1976, only four actions brought under Title III have been reported by the *Antitrust & Trade Regulation Report*.<sup>223</sup> The nature of these few cases, while certainly not conclusive evidence, fails to support the fears of opponents of the legislation. Congressional opponents predicted that Title III would be used by politically ambitious state attorneys general to elevate themselves in the eyes of the public by goading business' ox. Other critics opposed the bill on the ground that problems involved would outweigh the benefit to con-

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214. *Id.* at § 15(c)(b)(1).

215. *Id.* at § 15(c)(b)(2).

216. *Id.* at § 15(c)(b)(3).

217. *Id.* at § 15(c)(c).

218. *Id.* at § 15(c)(d)(2).

219. *Id.* at § 15(d).

220. *Id.* at § 15(e).

221. *Id.*

222. *Id.* at § 15(f).

223. See note 229 *infra*.

sumers.<sup>224</sup> Although substantial difficulties remain, for example, in showing that an overcharge was passed on to consumers unaffected by intervening transactions and various market pressures, these difficulties (and the fact that many antitrust violations affect the consumer only indirectly, for instance, through inflation) which inevitably limit the benefits flowing to the consuming public from the Act, do not negate such benefits as might result despite them.

Unfortunately, the Act may turn out to have been the victim of judicial infanticide. By establishing a conclusive presumption against the ability of anyone but the direct purchaser to prove damages, the *Illinois Brick* decision renders the Act significantly less valuable than it otherwise would have been. Congressional efforts to legislatively overrule *Illinois Brick* are underway.<sup>225</sup> Senator Edward Kennedy and Representative Peter Rodino have introduced bills to amend the Clayton Act so as to make even clearer Congress' intention to extend the relief granted by section 4 to indirect, as well as direct, consumers.<sup>226</sup> As currently drafted, the proposed legislation would also overrule *Hanover Shoe*,<sup>227</sup> thus permitting defendants to assert that a plaintiff was not injured because

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224. See H.R. REP. NO. 94-4994 (pt. 1), 94th Cong., 2d Sess. 24-25 (minority view of Messrs. Hutchinson, Railsback, Wiggins, Moorhead, Ashbrook, Hyde, and Kindness). For a detailed discussion of the Act and some of the anticipated problems with it, see Handler & Blechman, *Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and A Suggested New Approach*, 85 YALE L.J. 626 (1976). The authors argue that few antitrust violations provide consumers with compensable injuries, that the *parens patriae* act fails to deal with the problems of conflicts of interest among class members and adequate representation for absent parties, that constitutional problems arise from the taking of defendants' property without due process, and that by authorizing state officials to enforce federal antitrust laws the Act runs afoul of the appointments clause of the Constitution, U.S. CONST. art. II, § 2, cl. 2.

The Act's inability to remedy every single injury consumers receive because of antitrust violations should not be a crucial defect. Moreover, the "opt out" provision of the Act should obviate any conflict of interest problems, and the discretion given the court over distribution is likely to ease conflicting claims regarding amounts of damages owing particular individuals. State attorneys general are likely to provide adequate representation, and consumers who wish may exclude themselves and seek representation privately. Furthermore, the House Judiciary Committee determined that a defendant who has been adjudicated liable has no constitutionally protected interest in the manner of distribution of the damages. See note 171 *supra*. Finally, the appointments clause concerns separation of executive and legislative powers and is inapposite to the capacity of states to sue as *parens patriae*.

225. See 823 ANTITRUST & TRADE REG. REP. (BNA) A-3 (July 21, 1977).

226. The two bills, S. 1874, 95th Cong., 1st Sess. (1977) and H.R. 8359, 95th Cong., 1st Sess. (1977) are identical. They would amend § 4 of the Clayton Act by adding the words "in fact, directly or indirectly" after the word "injured." Comparable changes are made in other sections of the Act.

227. Because the proposed legislation will, if passed, cause the words "in fact" to be inserted, a defendant will presumably be able to contend that because a plaintiff passed on an overcharge, that plaintiff was not injured in fact.

the overcharge was passed on. Although this legislation has received widespread support from officials charged with enforcement of antitrust laws,<sup>228</sup> its passage is problematic.

An examination of actions brought under the *parens patriae* Act prior to the *Illinois Brick* decision is interesting in what it discloses about the type of injury involved and the relationship of the defendants to the consumers on whose behalf the suits have been brought. The attorneys general of three states have brought four *parens* actions which have been reported in the *Antitrust & Trade Regulation Report*.<sup>229</sup>

In *Colorado v. Valley Petroleum Co.*,<sup>230</sup> the attorney general of Colorado obtained indictments against five petroleum distributors for allegedly violating state antitrust laws and instituted a *parens patriae* action against the five and two additional defendants alleging violations of the Sherman Act. The action alleged that the companies conspired to raise and maintain an artificial price for more than 500,000 gallons of gasoline sold between December 1975 and April 1977. The state sought injunctive relief and treble damages in an amount to be determined after discovery but estimated to be several hundred thousand dollars, plus attorney's fees and costs. Six of the defendants have agreed to a settlement involving payment of \$128,404 in damages which will be placed in an interest-bearing "Colorado Antitrust Gasoline Fund," pending distribution.<sup>231</sup> The defendants also agreed to a plan prohibiting most communication between competitors regarding retail price.

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228. See, e.g., letter from the Federal Trade Commission to Senator Edward M. Kennedy (July 15, 1977), reported in 823 ANTITRUST & TRADE REG. REP. (BNA) A-12 (July 21, 1977); testimony of John H. Shenefield, Acting Assistant Attorney General For Antitrust, before the Senate Antitrust Subcomm. (July 21, 1977) reported in the Wash. Post, July 22, 1977, § D, at 6, col. 2 (Mr. Shenefield testified that the Justice Department strongly supports the proposed legislation to overrule the *Illinois Brick* decision); testimony of Chauncey H. Browning, Chairman of the Antitrust Comm. of the Nat'l Assoc., of Attorneys General before the Senate Antitrust Subcomm. (July 21, 1977) reprinted in part in 824 ANTITRUST & TRADE REG. REP. (BNA) A-12 (July 28, 1977) (Mr. Browning testified that the bill enjoyed the nearly unanimous support of state attorneys general from every region of the country). *Contra*, testimony of Earl E. Pollock before the Senate Antitrust Subcomm., reported in 824 ANTITRUST & TRADE REG. REP. (BNA) A-12 (July 28, 1977) (Mr. Pollock expressed misgivings about the effect of the proposed legislation on the problems of multiple liability and manageability).

229. *Colorado v. Valley Petroleum Co.*, No. 77-352 (D. Colo., filed Apr. 12, 1977), reported in 810 ANTITRUST & TRADE REG. REP. (BNA) D-1 (Apr. 21, 1977); *Maryland v. Jack Folev Realty, Inc.*, No. 77-618. (D. Md., filed Apr. 22, 1977), reported in 811 ANTITRUST & TRADE REG. REP. (BNA) D-3 (Apr. 28, 1977); *Colorado v. Bang & Olufsen of America, Inc.*, No. 77-528 (D. Colo., filed June 2, 1977), reported in 817 ANTITRUST & TRADE REG. REP. (BNA) D-1 (June 9, 1977); *Ohio v. Klosterman's French Baking Co.*, No. C-1-75-338 (S.D. Ohio, filed May 23, 1977), reported in 819 ANTITRUST & TRADE REG. REP. (BNA) D-1 (June 23, 1977).

230. 809 ANTITRUST & TRADE REG. REP. (BNA) D-1, Apr. 14, 1977.

231. 829 ANTITRUST & TRADE REG. REP. (BNA) D-1, Sept. 1, 1977.

In *Maryland v. Jack Foley Realty, Inc.*,<sup>232</sup> the state is seeking treble the amount of an alleged overcharge on real estate commissions which is also the subject of a federal criminal action in which six defendants have been found guilty.<sup>233</sup> The defendant realtors are charged with conspiring to fix commission rates in Montgomery County, a suburb of Washington, D.C. The state has requested court instructions respecting distribution of the damages which it hopes to recover. The state is also seeking injunctive relief, costs, and attorney's fees.

The attorney general of Colorado, in the second *parens* action on behalf of consumers living in that state, has brought a *parens* suit, *Colorado v. Bang & Olufsen of America, Inc.*,<sup>234</sup> against importers and distributors of phonographic equipment. The suit alleges a conspiracy to fix prices in stereophonic products through coercive distribution practices. In addition to injunctive relief, the state is seeking damages equaling the difference between fair market and manipulated prices for the affected products.

In *Ohio v. Klosterman's French Baking Co.*,<sup>235</sup> the state was joined by the school system of Cincinnati in charging three bakeries with a conspiracy to submit fixed bids to various school systems in Ohio. The action was settled and three separate consent decrees entered. Under the terms of the settlement, the state and the school system will divide a \$65,000 recovery. The plaintiffs had sought injunctive relief, recovery of a \$50 per diem civil penalty provided by state law, plus treble damages for Sherman Act violations, double damages for violations of state laws, costs, and attorney's fees.

These four cases and the fact that many more have not been reported indicate that public officials are approaching the *parens patriae* act with caution. While it is reassuring to have restrained testing of the waters, it is hoped that after an initial period the states will engage in vigorous prosecution of antitrust violators under the Act. The *Illinois Brick* decision has temporarily impeded any large scale enforcement effort by limiting the Act's effect to cases in which only one transaction has occurred. As the four cases considered here indicate, however, significant enforcement activity should be possible even within the confines of *Illinois Brick*. Both the Maryland real estate and the Ohio baking company cases appear to involve the type of direct purchases required by

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232. 811 ANTITRUST & TRADE REG. REP. (BNA) D-1, Apr. 28, 1977.

233. No. 77-0185 (D. Md., filed Sept. 28, 1977), reported in Wash. Post, Oct. 29, 1977 § C, at 1.

234. 817 ANTITRUST & TRADE REG. REP. (BNA) D-1, June 9, 1977.

235. 819 ANTITRUST & TRADE REG. REP. (BNA) D-1, June 23, 1977.



*Illinois Brick*. *Valley Petroleum* may very well also involve direct purchases depending on the arrangements between the distributors and retailers. *Bang & Olufsen* demonstrates the unfortunate potential of the *Illinois Brick* decision. Despite a chain of distribution apparently involving only three levels, consumers, such as the purchasers of stereophonic equipment in *Bang & Olufsen*, are precluded from recovery.

Nevertheless, it appears that antitrust violations are occurring in which individual consumers are injured as direct purchasers. Even if, because of *Illinois Brick*, the *parens* act accomplishes no more than redressing a significant number of injuries of this type, passage of the bill will not have been a wasted effort. Whether and to what extent the courts will be receptive to *parens* actions remains to be seen. The Supreme Court has already, according to some observers, flouted the plain intent of Congress. If congressional efforts to overrule the *Illinois Brick* decision legislatively are successful, Congress' intent to provide a meaningful remedy for individuals damaged by violations of the antitrust laws should be clear even to the *Illinois Brick* majority. Such legislation is also certain to encourage state officials to utilize the Act.

The courts have displayed increasing reluctance to permit actions which aggregate the claims of large numbers of consumers. Whether the problems which have limited the effectiveness of the class action will beset the *parens patriae* action depends on the care with which the actions are brought and the attitude of the judiciary. To the extent that judicial reticence to entertain *parens* actions improves their quality and effectiveness, it may serve a valuable function. However, to the extent that the courts deny a congressionally mandated remedy to the individual consumer who can prove injury because of a feeling that individual injuries are inconsequential, they will be guilty of a disservice to the consumer, the nation's economic health, and the law.

#### CONCLUSION

If the policy of the antitrust laws in general and, specifically, section 4 of the Clayton Act is deterrence of potential violators coupled with compensation of victims, that enforcement mechanism which guarantees a maximum of both should be pursued. Unfortunately, the conclusion is inescapable that the Supreme Court has undertaken a course diametrically opposed to the policy suggested here. While paying lip service to the ideal of compensating innocent consumers injured in their pocketbooks by the unscrupulous, avaricious, and illegal practices of large and small businessmen, the Court based its decision on a thinly veiled sympathy for the antitrust defendant. To be sure, constitutional principles require that a defendant's right not be violated. However, there is no constitutional

requirement that the Court place prohibitive burdens on the very classes which rule 23 was designed to benefit, as it did in *Eisen*. Neither should the Court, in the words of former Senator Hugh Scott, "flout the will and purpose of Congress in a most crass fashion,"<sup>236</sup> as it did in *Illinois Brick* by gutting the *parens patriae* bill and signaling to business that antitrust violations are not taken seriously by the highest court of the land. As Justice Brennan observed in his dissent from that decision, similar judicial obstinacy led to the passage of the Clayton Act in 1914.<sup>237</sup> It is a sad commentary on the present Court that its erosion of the few tools available for the realization of the purpose of the Act has again made remedial legislation necessary. Equally disheartening is Congress' apparent lack of independence from the business lobby, as evidenced by the fact that remedial legislation appears unlikely in the near future.

The Clayton Act was not the result, however, of congressional fortitude, but of vocal public outrage at reprehensible business practices. It remains to be seen whether the public will once more see through the self-serving and alarmist entreaties of the business lobby and pressure Congress into overturning the *Illinois Brick* decision by passing additional legislation making clear that the policies of the Clayton Act are still the policies endorsed by the Congress of the United States.

*Philip Fairbanks*

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236. Testimony of former Senator Hugh Scott before the Senate Antitrust Subcomm. (July 21, 1977), reprinted in 824 ANTITRUST & TRADE REG. REP. (BNA) A-13 (July 28, 1977). Mr. Scott also stated that the Court had engaged in "at best, a disingenuous bit of legalistic sophistry and, at worst, a rather high-handed exercise in judicial legislation, while soaking consumers with the impact of their constitutional 'last best guess.'" *Id.*

237. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 758 (1977) (Brennan, J., dissenting).

